INDEX

PAGE

Jurisdiction 2

Reasons for Petition for Rehearing 2

Conclusion 15

TABLE OF CASES CITED

Bertram v. Johnson, et al, C. A. #143-50, Dist. Ct. DC 3

Breiner, et al v. Wallin, et al, C. A. #7694, Ct. of App. Third Circ. 3

Callahan v. Wallin, et al, C. A. #8613, E. D. of Penna. 3

Dawson v. Sullivan, et al, C. A. #2119-49, Dist. Ct. DC 3

Fischer, et al v. Matthews, et al, C. A. #9296, Dist. Ct. DC 3

Hilton v. Sullivan, et al, 334 U. S. 323, 92 L. Ed. 1416 3

Hopkins, et al v. Wallin, et al, C. A. #8848, E. D. of Penna. 3

Hunter, et al v. Matthews, et al, C. A. #9994, Dist. Ct. DC 3

Levy et al v. Watt et al, C. A. #50-260 Dist. Ct. for Dist. of Mass. 9

Reynolds, et al v. Matthews, C. A. #424-49, Dist. Ct. DC 3

Salter v. Matthews, et al, C. A. #2382-49, Dist. Ct. DC 3

Schweizer v. Kniskern, et al, C. A. #8913, E. D. of Penna. 3

Sullivan v. Johnson, C. A. #1012-49, Dist. Ct. DC 3

Wettre et al v. Hague et al, 168 F. 2d 825 4

AUTHORITIES CITED

Act of August 23, 1912, 37 Stat. 413, 5 USC 648 3

Act of June 27, 1944, 58 Stat. 387, 5 USC 851 ..... 3, 4

Supreme Court of the United States

October Term, 1949

No. 721

JEPSON L. NELSON, *Petitioner*,

v.

LOUIS JOHNSON, SECRETARY OF NATIONAL DEFENSE, ET AL., *Respondents*,

---

No. 721

CHARLES W. REEVES, *Petitioner*,

v.

LOUIS JOHNSON, SECRETARY OF NATIONAL DEFENSE, ET AL., *Respondents*.

Petition for a Rehearing on a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioners and present their petition for a rehearing of the petition for certiorari in the above entitled cases.

1.

JURISDICTION

The petition for certiorari was filed on March 30, 1950 and was denied on May 15, 1950. This petition is filed within 15 days thereafter as required under the rules of this court.

2.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioners reiterate each and every ground, matter and thing set forth in the original petition for certiorari.

Counsel for the petitioners cannot understand the reason for the denial of the writ of certiorari. The application is made under Rule 38(b) in which the following example of grounds for the issuance of the writ is stated to be:

> (b) "Where a Circuit Court of Appeals has rendered a decision in conflict with another Circuit Court of Appeals on the same matter."

These cases fall squarely within the rule above quoted. Counsel understands that the issuance of the writ is a matter of judicial discretion, but where it appears that positive grounds for the issuance of the writ exist under the rules of this Court, it would seem that the petition for certiorari should be granted.

These cases are of the utmost importance. There has been a wide-spread violation of Veterans Preference Laws by government officials particularly in the Shipyards under the jurisdiction of the Navy Department. Numerous suits have been brought against Naval Yard officials to compel obeyance to the preference accorded to Veteran Preference eligibles in governmental employment. Among these cases are the following:

Bertram v. *Johnson, et al,* C. A. #143-50, Dist. Ct. DC
Breiner, et al v. *Wallin, et al,* C. A. #7694, Ct. of App. (3rd) Circ.
Callahan v. *Wallin, et al,* C. A. #8613, E. D. of Penna.
Dawson v. *Sullivan, et al,* C. A. #2119-49, Dist. Ct. DC
Fischer, et al v. *Matthews, et al,* C. A. #9296, Dist. Ct. DC
Hopkins, et al v. *Wallin, et al,* C. A. #8848, E. D. of Penna.
Hunter, et al v. *Matthews, et al,* C. A. #9994, Dist. Ct. DC
Reynolds, et al v. *Matthews,* C. A. #424-49, Dist. Ct. DC
Salter v. *Matthews, et al,* C. A. 2382-49, Dist. Ct. DC
Schweizer v. *Kniskern, et al,* C. A. #8913, E. D. of Penna.
Sullivan v. *Johnson,* C. A. #1012-49, Dist. Ct. DC

All of the above named cases involved an issue of law identical as in the *Nelson* and *Reeves* cases. The principal question of law arises from the determination of whether the 1912 statute, which reads as follows:

> "In the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary." (5 U. S. C. 648)

As the same was extended by Executive Order of the President of the United States, was in force and effect after passage of the Act of June 27, 1944, known as the Veterans Preference Act.

This Court in the case of *Hilton* v. *Sullivan, et al,* 334 U. S. 323, 92 L. Ed. 1416, referring to the 1912 statute at page 1425, said:

> "And subsequent executive orders not only recognized this provision as giving veterans an absolute preference but also extended the preference to veterans in the field service and to positions not under civil service."

The employees of the Philadelphia Naval Shipyard where the petitioners are employed are in the so-called field service. They fall directly within the Executive Order which extended the statute to the field service.

This Court held in *Hilton* v. *Sullivan, supra,* that the statute in question was "an absolute command that no honorably discharged soldier or sailor whose record was good could be DISCHARGED, or REDUCED IN RANK, GRADE AND SALARY."

Yet this is exactly what happened to petitioners Nelson and Reeves. They were reduced in rank and grade and non-veterans were retained in their grades. This was a plain, deliberate and wilful violation of the statute and Executive Order construed by this Court in *Hilton* v. *Sullivan, supra.* There is no issue of fact in these cases, the facts are admitted, there is only a question of law involved. May public officials wilfully violate the law and is there no immediate relief for the petitioners?

The United States Court of Appeals for the First Circuit held, in the case of *Wettre et al* v. *Hague et al,* 168 F. 2d 825, that the 1912 statute and Executive Order which extended the same were not repealed by the Act of June 27, 1944 known as the Veterans Preference Act.

The United States Civil Service Commission holds that the 1912 statute and Executive Order extending the same WERE REPEALED by the Act of June 27, 1944. Here is the authority to this effect. In a letter to counsel for the petitioners under date of February 14, 1950, the United States Civil Service Commission ruled as follows:

> "The next point you make has to do with the Act of 1912 regarding reductions in force. It is your position that the Act of 1912 is still current law and that the rights of veterans should be determined in the light of the law. In this connection you have referred to the case of Hilton v. Sullivan. As you know, the Commission, with the strong support of the De-

partment of Justice, has taken the position that the applicable provision of the Act of 1912 has been superseded by Section 12 of the Veterans Preference Act. This question is involved in several suits now pending in various courts. May I refer you to the opinion of Judge Galston in the United States District Court, Eastern District of New York, Civil Action No. 9296, William A. Fischer, et al v. F. E. Haeberle, et al. In that case the court agreed with the views of the Commission that the applicable provision in the Act of 1912 was superseded by the Veterans Preference Act."

/s/ Harry B. Mitchell,
Chairman"

In the case of *Wettre et al* v. *Hague et al, supra,* the First Circuit held that the plaintiffs rights were so fixed and determined by the 1912 statute that it was not even necessary to exhaust any administrative remedies. In so doing they stated as follows:

"When this case was tried below, and even when it was argued before us on appeal, it was an open question whether the Veterans' Preference Act of 1944 narrowed, or whether it left unaffected, the long-existing broad scope of the preferences given to veterans by the proviso of Sec. 4 of the Act of 1912, supra, which reads:

"Provided, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary."

Now, however, this question has been put at rest. The very recent decision of the Supreme Court of the United States in Hilton v. Sullivan, 68 S. Ct. 1020, 1026, authoritatively establishes that Congress in the Veterans' Preference Act of 1944 did not intend to restrict, limit or narrow the scope of the benefits conferred upon veterans by earlier legislation, but instead intended to enlarge the preference in government employment they already enjoyed. And in the Hilton case the Supreme Court said that there was

nothing ambiguous about the language of the 1912 proviso quoted above, and that "It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'. Length of service in no way qualified the preference given the veteran."

We are not concerned here with the full scope of the preference given to veterans by the statute as thus interpreted—whether it means that veterans with a rating of 'good' have to be retained on the government's payroll even though there may be no work remaining for them to do (see Longfellow v. Gudger, 57 App. D. C. 50, 16 F. 2d 653, 656), or whether veterans with that rating cannot be reduced from supervisory rank even though there may be no employees left for them to supervise. These are questions for consideration when they arise. The complaint as we read it alleges only that the plaintiffs, being veterans with a rating of 'good', are about to be demoted from given supervisory positions while non-veterans, presumably with greater seniority, are being retained in those positions. Since this clearly alleges a violation of the planitiffs' legal rights under the applicable statute as it is now construed, there is no longer any occasion for the requirement that they exhaust whatever administrative remedies they may have before seeking to vindicate their rights in court, for, as the Supreme Court said in Order of Railway Conductors of America v. Pitney, 326 U. S. 561, 566, 66 S. Ct. 322, 324, 90 L. Ed. 318, "Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; Virginian R. Co. v. System Federation, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789."

Thus in view of the decision in the Hilton case, the judgment appealed from must be set aside and the case remanded for rulings on the other grounds ad-

vanced by the defendants in support of their motion to dismiss, if they care to press them in view of the decision in Williams v. Fanning, 332 U. S. 490, 68 S. Ct. 188, decided after the case at bar was decided by the court below, and, if that court finds it appropriate, for determination on the merits.

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings consistent with this opinion."

The United States Court of Appeals for the District of Columbia does not agree with this opinion of the First Circuit.

Thus we have the First Circuit holding that the 1912 statute and Executive Order were not repealed based upon the decision of this Court in *Hilton* v. *Sullivan, supra,* and the United States Civil Service Commission ruling that the 1912 statute and Executive Order were repealed.

There are no facts to be determined by the United States Civil Service Commission. The petitioners were admittedly reduced in rank and grade due to a reduction in the force in the Philadelphia Naval Shipyard. These facts were pleaded in the complaint and the motion for summary judgment admits them. There is only an issue of the law to be determined and that is whether the First Circuit is right in ruling that the 1912 statute and Executive Order were not repealed, and therefore the administrative remedies did not have to be exhausted, and the United States Court of Appeals for the District of Columbia ruling that the administrative remedies would have to be exhausted.

The conflict of opinions is due to the difference of opinions whether the 1912 statute and Executive Orders extending the same to the field service was superseded by the 1944 Veterans Preference Statute. If it was not as held by the First Circuit, then as this Court said, that statute was an "absolute command" that no honorably discharged soldier or sailor whose record was good could

be discharged or reduced in rank, grade and salary, no exhaustion of administrative remedies is necessary. These cases, therefore, involve the question of whether the 1912 statute was superseded by the Act of 1944.

What would be accomplished by an appeal to the United States Civil Service Commission? The only issue is one of law, and they have already ruled against the petitioners. This Court, in the interest of right and justice, should not require the petitioners to go back to the United States Civil Service Commission for the sole purpose of having them re-affirm that the 1912 statute and Executive Orders issued thereunder were repealed by the Act of June 27, 1944. That question should be now decided, and this Court should take jurisdiction to decide it, and settle the dispute as to the law between the First Circuit, the Court of Appeals for the District of Columbia and the United States Civil Service Commission. Petitioners believe that this Honorable Court should grant the petition to carry out the Court's rules applicable to petitions for certiorari where there is obviously a conflict of opinions, and it would seem that perfect grounds exist for the allowance of the petition for certiorari. It would seem that a plain duty is forced upon this Court, to take jurisdiction and to carry out the purposes for which this Court was created, to settle disputed questions of law.

But there exists other reasons for the issuance of the writ of certiorari. Since the decision of the United States Court of Appeals for the District of Columbia, the District Court here has refused to issue preliminary injunctions restraining the Secretary of National Defense, and the Secretary of the Navy from reducing a veteran preference eligible in rank, grade and salary. The injunction was refused in the case of *Bertram* v. *Johnson et al*, Civil Action #143-50, Dist. Ct. DC, based upon the ruling of the Court of Appeals for the District of Columbia in these cases.

At the same time, the United States District Court for the District of Massachusetts has issued a preliminary injunction in the case of *Levy et al* v. *Watt et al* restraining the defendants, officials of the Boston Naval Shipyard, from reducing certain of the plaintiffs in rank, grade and salary. In that case the plaintiffs did not exhaust their administrative remedies. The District Court followed the opinion of the First Circuit in the case of *Wettre et al* v. *Hague et al, supra,* which it had every right to do. Judge McCarthy rendered the following opinion:

Levy et al v. *Watt et al*
Opinion by
Judge McCarthy

This is a "suit for preliminary and permanent injunction, injunctive relief, for a restraining order, for declaratory judgment and judicial review of agency action". The suit is brought by fifteen employees of the Boston Naval Shipyard, all of whom are veterans of wartime service in the armed forces of the United States, against the Commander of that Shipyard and several members of his staff, to secure injunctions restraining proposed demotions of plaintiffs. The case is before me on plaintiffs' motion for a preliminary injunction.

The plaintiffs in this action have been informed by written notice that it is proposed to demote them from the supervisory positions which they presently hold in the Boston Naval Shipyard. These proposed demotions will become effective on or about May 1, 1950.

All of the plaintiffs are permanent civil service employees with competitive status. All of the plaintiffs except Curtis and O'Brien have efficiency ratings of "excellent" and Curtis and O'Brien have efficiency ratings of "very good".

The defendants are employees of the United States Government in the Boston Naval Shipyard; the defendant Watt is the Commander of said Shipyard; the defendant Stillwell is the Industrial Relations

Officer; the other named defendants are Masters in said Shipyard.

The palintiffs Swenson, Brisbois, Anderson, Hall, Quatromoni, Fraser, Hubble and Pike are conditional appointees to their respective supervisory positions. It has been stipulated that each of these plaintiffs was appointed to his present position upon the condition that he take and pass a civil service examination therefor and that he secure a rating which would place him within reach on the register to be drawn as a result of the examination. All of these plaintiffs named in this paragraph have failed to secure such a position on the register for their respective positions and trades, under the applicable provisions of Naval Civilian Personnel Instructions 160. All of the other plaintiffs are in a "non-conditional" status in their respective supervisory positions.

If the plaintiffs Curtis, O'Brien and Fraser are demoted from their present supervisory positions no non-veterans will remain in the positions from which they will be demoted. In the case of the plantiff Fadden, who has the position of Chief Quarterman Electric Welder, a non-veteran occupying the position of Foreman Welder, will be retained. In the case of the plaintiffs other than Curtis, O'Brien, Fraser and Fadden, non-veterans will be retained in supervisory positions within the competitive area from which plaintiffs will be demoted.

The proposed demotions are part of or the proximate result of a reduction in force which has been taking place in the Boston Naval Shipyard.

If the plaintiffs Gunning (Quarterman Plumber), Levy, Kelleher, and Cotter (Leadingman Plumbers) are demoted as proposed, certain non-veterans whose names appear below those of these plaintiffs on the Quarterman Plumber and Leadingman Plumber lists, which are maintained in the Boston Naval Shipyard, will be retained in the positions which these plaintiffs now occupy.

It is not controverted that if each plaintiff is reduced in rank and salary from his present supervisory position to the next inferior rank the loss of income in each case, without regard to other benefits,

as a direct result of the reduction will be in excess of $500 per year. The average loss of salary will amount to approximately $700.00 per year. Each plaintiff has in excess of eight years before reaching the retirement age of seventy.

This action is based upon the Act of August 23, 1912 (5 USCA 648) and the Act of 1944 (5 USCA 861), known as the Veterans' Preference Act, Executive Orders of the Presidents extending to and granting preference to honorably discharged soldiers, sailors, or marines in the civilian employment of the United States who have an efficiency rating of "good" or better. I find that the requisite amount in controversy to give this court jurisdiction of the action ($3,000, exclusive of interest and costs) is present. I, therefore, conclude that this court has jurisdiction of the instant case.

As to the plaintiffs Gunning, Levy, Kelleher and Cotter, I feel that a preliminary injunction should issue against the defendants. Section 4 of the Act of 1912, as amended, provides that in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated "good" shall be discharged or dropped or reduced in rank or salary. The Veterans' Preference Act of 1944 does not restrict the scope of the benefits conferred upon veterans by the Act of 1912, as amended. *Hilton v. Sullivan,* 334 U. S. 323; *Wettre v. Hague,* 1 Cir., 168 F. 2d 825. The demotion of the plaintiffs Gunning, Levy, Kelleher and Cotter from their supervisory positions during a reduction in force clearly appears to violate the provisions of Section 4 of the Act of 1912, as amended, as long as non-veterans with equal or lower efficiency ratings are retained with no decrease in pay in the positions from which these plaintiffs are to be demoted. To maintain the status quo until the merits of the claims of Gunning, Levy, Kelleher and Cotter have been determined, an order will issue enjoining such demotion.

I am not disposed to enjoin the defendants from demoting the plaintiffs, Swenson, Brisbois, Anderson, Hall, Quatromoni, Fraser, Hubble and Pike. These

plaintiffs are conditional appointees whose right to preference in their supervisory capacities was dependent upon their passing a competitive promotion examination and attaining a rating which would place them within reach on the respective registers. It is clear that this condition has not been fulfilled. Consequently, this is not a case where the alleged violation of the plaintiffs' respective rights is so clear as to warrant the issuance of a preliminary injunction.

In the case of the plaintiffs Fraser, Curtis and O'Brien non-veterans will not be retained in the same positions if these plaintiffs are demoted. The court declines to issue a preliminary injunction as to them.

If the plaintiff Fadden is demoted, no non-veteran will be retained in the same position which this plaintiff now occupies.

It is, therefore, ORDERED that defendants, and each of them, their agents, servants, employees and attorneys, collectively and individually, are enjoined during the pendency of this action from demoting the plaintiffs Edward J. Gunning, Leo C. Levy, Michael J. T. Kelleher and William F. Cotter from their present respective permanent civil service positions in the Boston Naval Shipyard so long as there are competing nonpreference employees with equal or lower efficiency ratings holding positions within the competitive area which plaintiffs are qualified and willing to fill.

The issuance of the preliminary injunction is conditioned upon the giving of security in the sum of $1500 by each of the plaintiffs Edward J. Gunning, Leo C. Levy, Michael J. T. Kelleher, and William F. Cotter, in accordance with Rule 65 (c), Federal Rules of Civil Procedure.

The motion for preliminary injunction in respect to all of the plaintiffs other than Gunning, Levy, Kelleher, and Cotter is denied.

It will thus be seen that two rules apply, one in the District of Columbia where the veteran preference eligibles cannot get relief although their rights are being wilfully violated, and one in the United States District Court for the District of Massachusetts where the District Court grants the injunction. In both instances, the facts are

identical, it is only the law of the case which is different. In this jurisdiction the Court of Appeals compels the petitioners to go to the United States Civil Service Commission when they already now know what the answer will be, and in the First Circuit they are not required to do this futile thing.

It is true that upon a remand of the *Wettre et al v. Hague et al, supra,* case to the District Court that case was dismissed on another ground, the fact that the complaint did not allege damages to the extent of $3,000 as to each plaintiff. But this in no way changes the opinion originally rendered in the case which Judge McCarthy followed in granting the preliminary injunction in the case of *Levy et al v. Watt et al.*

In the brief in opposition to the brief of the petitioners it is stated that:

> "Indeed, the First Circuit's ruling on that aspect of the case is so radical a departure from the principles reiterated in the cited cases, that it may be expected that that Court of Appeals will itself correct its holding."

The decision of the First Circuit in *Wettre et al v. Hague et al, supra,* is based upon a sound principle of law that no one is required to do a futile thing. In the opinion of counsel for the petitioners who argued the *Wettre* case before the First Circuit, there is no hope of reversal of that decision unless the Court is so compelled by a decision of this Court. It is the only proper and just decision that could be made in a case where the facts are undisputed under the decision of this Court in *Hilton v. Sullivan, supra.*

The United States Court of Appeals for the District of Columbia totally ignored the language of the opinion of Mr. Justice Black in *Hilton v. Sullivan, supra,* and particularly that language which stated that the 1912 statute was an absolute command that no honorably discharged soldier or sailor whose record was good could be dis-

charged, or reduced in rank, grade and salary. If this be the construction of the statute, how could the United States Civil Service Commission change the meaning of the statute and the Executive Orders issued pursuant thereto.

The Court below in its opinion said:

> "We think the District Court erred in granting summary judgment to appellees. In Wettre v. Hague, 168 F. 2d 825, the Court of Appeals for the First Circuit based a different conclusion on Order of Railway Conductors v. Pitney, 326 U. S. 561, 566, and Hilton v. Sullivan, 334 U. S. 323."

This shows conclusively a difference of opinion on the questions of law between the two Circuits. If the rules of this Court mean anything they should mean that the petition for certiorari should be granted or else it will serve notice upon counsel for parties before this Court that this Court ignores its own rules and they cannot safely advise clients in the matter of applying for writs of certiorari.

Counsel knows that this Court is burdened with perhaps a number of applications for writs of certiorari which probably have little or no merit. These cases have merit, they are of interest not only to the approximately 100 men who have filed suits to protect their rights under the Veterans Preference Act, but to thousands of veterans in governmental employment. If public officials charged by law and under their oath of office can wilfully and deliberately violate the law as the Respondents in this case have done in reducing the petitioners in rank, grade and salary, in the very teeth of a statute and Executive Orders to the contrary, then Congress should be called upon to enact penal statutes to correct such situations.

The original petition for certiorari did not go into detail and length because, it was believed by the counsel for petitioners, that under this Court's rules the writ would be granted to settle the conflict between the two

Circuits. It was planned later to file an extensive brief in the matter.

CONCLUSION

WHEREFORE, petitioners respectfully urge that a rehearing be granted. That upon further consideration the order of May 15, 1950, denying the petition for certiorari, be revoked and the writ of certiorari issued.

CLAUDE L. DAWSON,
917 - 15th St., N. W.,
Washington, D. C.
Attorney for the Petitioners.

I, Claude L. Dawson, attorney for the petitioners, Jepson L. Nelson and Charles W. Reeves, do hereby certify that the foregoing petition for rehearing of these causes is presented in good faith and not for delay.

CLAUDE L. DAWSON,
Attorney for the Petitioners.